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# POLYGAMY AND SAME-SEX MARRIAGE

*David L. Chambers\**

## I. INTRODUCTION

In the American federal system, state governments bear the responsibility for enacting the laws that define the persons who are permitted to marry. The federal government, throughout our history, has accepted these definitions and built upon them, fixing legal consequences for those who validly marry under state law. Only twice in American history has Congress intervened to reject the determinations that states might make about who can marry. The first occasion was in the late nineteenth century when Congress enacted a series of statutes aimed at the Mormon Church, prohibiting polygamy in the Western territories and punishing the Church and those within it who entered into polygamous marriages. The more recent occasion was just last year. In the summer of 1996, Congress adopted the Defense of Marriage Act, which provides that, regardless of state laws, all acts of Congress referring to married persons shall be read as applying only to persons married to a person of the opposite sex.

During the hearings and debates that led to the Defense of Marriage Act, many members of Congress and many witnesses drew comparisons between polygamy and same-sex marriage. Most of the comparisons were shallow and sarcastic, but, taken as a group, they offer interesting insights into conceptions of marriage and family in this country. They also prompted me, an advocate of same-sex marriage, to examine the history of governmental response to polygamy in the United States and to compare that experience with the current experience of lesbians and

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gay men in their efforts to establish a legal right to marry persons of the same sex.

The brutal response to Mormon polygamy offers sobering warnings to those of us who would tinker with mainstream Americans' conception of marriage. At the same time, it is not mainstream Americans alone who need to become more comfortable with difference. In the United States, polygamy has been regarded with hostility by the right, the middle, and the left—today and in the past. One of the lessons to be derived from exploring the history of reactions to Mormon polygamy is that all of us, including those of us who favor same-sex marriage, find difference threatening, and that all of us, including those who favor same-sex marriage, need to work harder to understand those who are different from us.

## II. POLYGAMY IN THE DEBATES OVER THE DEFENSE OF MARRIAGE ACT

In May of 1993, the Supreme Court of Hawaii held that its law limiting marriage to opposite-sex couples was presumptively unconstitutional under the Hawaii constitution's equal protection clause when taken together with another constitutional provision prohibiting discrimination on the basis of sex.<sup>1</sup> The Supreme Court gave the State an opportunity to demonstrate to a lower court that it had compelling reasons of policy for limiting marriage to opposite-sex couples.<sup>2</sup> After much delay at the State's request, a hearing was held in the lower court. In December 1996, the trial court, unpersuaded by the State's asserted reasons, held that the Hawaii constitution compels that same-sex couples be permitted to marry on the same terms as opposite-sex couples.<sup>3</sup> The case is now back before the Hawaii Supreme Court.<sup>4</sup>

The decisions of the Hawaii courts produced a lively public debate and a virulent political reaction both in Hawaii and in the rest of the country.<sup>5</sup> In Hawaii itself, the legislature voted to submit to the state's

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1. *See* Baehr v. Lewin, 852 P.2d 44, 67 (Haw. 1993).

2. *See id.* at 68.

3. *See* Baehr v. Miike, CIV. No. 91-1394, 1996 WL 694235, at \*20-22 (Haw. Cir. Ct. Dec. 3, 1996).

4. The case is currently docketed as No. 20371 before the Hawaii Supreme Court.

5. *See* 142 CONG. REC. H7480 (daily ed. July 12, 1996); 142 CONG. REC. H7441 (daily ed. July 11, 1996). Showing his emotion over the subject, a member of the House of Representatives stated: "The very foundations of our society are in danger of being burned. The flames of hedonism, the flames of narcissism, the flames of self-centered morality are licking at the very foundations of our society: the family unit." 142 CONG. REC. H7482 (daily ed. July 12, 1996) (statement of Rep.

voters a constitutional amendment that would permit the legislature to limit marriage to opposite-sex couples.<sup>6</sup> Nearly twenty other states also enacted legislation in direct response to the Hawaii decisions. Many declare that in their state, marriage is limited to one man and one woman, and all declare that their state will not recognize a marriage between two people of the same sex even when validly conducted in another state.<sup>7</sup>

Even Congress has expressed itself. In the summer of 1996, at the height of election fever, each chamber passed, by overwhelming margins, a bill that Congress called the Defense of Marriage Act<sup>8</sup> ("DOMA"). DOMA has two substantive sections. One declares that states need not recognize a same-sex marriage conducted in another state. The other declares that all federal statutes and regulations that refer to married persons or spouses shall be read as applying to persons in opposite-sex relationships only. The intended effect of the two provisions is to leave a gay couple married in Hawaii both at the mercy of other states and, uniquely among persons legally married in the United States, without federal government recognition of their relationship.

The title of the Act, the Defense of Marriage Act, is revealing. Since the bill deals solely with same-sex marriage, the title is intended to convey that gay marriage is a threat to the entire institution of marriage, and many of those who favored the bill appeared to believe that it was. Gary Bauer, the President of the Family Research Council, testifying in support of DOMA before the Senate Judiciary Committee stated, "We are being asked to restructure our entire sexual morality and social system to embrace a concept that has never been accepted anywhere in the world

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Barr). Following Rep. Barr's comments crucifying the same-sex marriage movement, another Representative responded: "The factors that erode marriages, the factors that lead to divorce, the factors that lead to abandonment and spousal abuse, none of them have ever been attributed to, in any significant degree, same-sex marriage." *Id.* (statement of Rep. Frank).

The Hawaii legislature reacted by amending its marriage statute to expressly provide that it would not apply to same-sex marriages and challenged the court's authority to rule on a policy question such as this. *See* Act of June 22, 1994, No. 217, 1994 Haw. Sess. Laws 526, 530-31 ("The legislature finds that Hawaii's marriage licensing statutes, both as originally enacted and at present, are intended to apply only to male-female couples, not same-sex couples. . . . [and it] is a policy question within the exclusive purview of [the legislature].").

6. It also voted to extend to long-term couples who were not married some of the benefits of marriage. *See* H.B. 117, 19th Leg. (Haw. 1997).

7. *See, e.g.*, ALASKA STAT. § 25.05.013 (Michie Supp. 1996); ARIZ. REV. STAT. ANN. § 25-112 (West 1991 & Supp. 1997); GA. CODE ANN. § 19-3-3.1 (Supp. 1997); 750 ILL. COMP. STAT. ANN. § 5/216 (West 1993); VA. CODE ANN. § 20-45.2 (Michie Supp. 1997).

8. Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996) (to be codified at 28 U.S.C. § 1738C and 1 U.S.C. § 7).

by any major culture. . . . [M]arriage is a unique bonding of the two sexes . . . . It is the core of civilization."<sup>9</sup> He believed that Congress needed to protect civilization by excluding gay people from the benefits of marriage. Another witness, Dennis Prager, a conservative commentator, was more direct: "At stake is our civilization."<sup>10</sup> And Jesse Helms, on the floor of the Senate, cried out, "[A]t the heart of this debate is the moral and spiritual survival of this Nation."<sup>11</sup>

In the legislative hearings and debates on DOMA, the subject of polygamy arose often in two quite different contexts. The first, which I will discuss only briefly, was a somewhat technical legal point regarding conflicts of laws. The opponents of DOMA claimed that the section of DOMA declaring that states need not recognize the marriage of two persons of the same sex married in another state was unnecessary.<sup>12</sup> They said that while states routinely give legal effect to a marriage conducted in another state or country, states have always refused to recognize marriages that violated some strongly held public policy of the state.<sup>13</sup> Thus, they pointed out, courts have refused to recognize a polygamous marriage conducted in another country and the marriage of first cousins validly conducted in another state.<sup>14</sup> DOMA was unnecessary, they claimed, because a state that believed strongly in the immorality of same-sex marriage already possessed all the authority it needed to deny recognition of a same-sex marriage.<sup>15</sup>

A second and more provocative way that polygamy arose was in direct analogies between it and same-sex marriage drawn by some

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9. *Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 22 (1996).

10. *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 133 (1996).

11. 142 CONG. REC. S10,068 (daily ed. Sept. 9, 1996).

12. See 142 CONG. REC. S10,117 (daily ed. Sept. 10, 1996) (statement of Sen. Feinstein).

13. See RESTATEMENT (SECOND) OF CONFLICTS OF LAWS § 283 cmts. j-k (1971); Deborah M. Henson, *Will Same-Sex Marriages Be Recognized in Sister States?: Full Faith and Credit and Due Process Limitations on States' Choice of Law Regarding the Status and Incidents of Homosexual Marriages Following Hawaii's Baehr v. Lewin*, 32 U. LOUISVILLE J. FAM. L. 551, 560-61 (1993-1994).

14. See Henson, *supra* note 13, at 561-64.

15. See *id.* at 560 (citing *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981)). Larry Kramer, however, has recently argued persuasively that this public policy exception to the general rule of recognizing marriages conducted in another state should itself be regarded as unconstitutional, and that Congress had no power, through legislation such as DOMA, to authorize states to ignore a marriage validly conducted in another state that they would otherwise be constitutionally compelled to recognize. See Larry Kramer, *Same-Sex Marriage, Conflict of Laws, and the Unconstitutional Public Policy Exception*, 106 YALE L.J. 1965 (1997).

witnesses and members of Congress. Many proponents of the bill claimed that if same-sex marriage was permitted, no logical basis would exist for declining to recognize other forms of marriage universally regarded as inappropriate. For example, at hearings in the House of Representatives, Professor Hadley Arkes of Amherst College, a scholar of natural law, argued that if the "natural" configuration of one woman and one man were abandoned, there would be no rational stopping point:

[I]f we detach marriage from that natural teleology of the body, on what ground of principle could the law confine marriage to couples? On what ground would the law say no to people who profess that their love is not confined to a coupling, but woven together in a larger ensemble of three or four? . . . If that arrangement were made available to ensembles of the same sex, it would have to be made available to ensembles of mixed sexes, which is to say we'd be back in principle to the acceptance of polygamy.<sup>16</sup>

Members of Congress picked up the theme, catching witnesses who opposed the bill off guard by asking them whether they favored polygamy and how they could distinguish it from same-sex marriage.<sup>17</sup> Congressman Bob Inglis of South Carolina asked a panel of witnesses that included Andrew Sullivan, a former editor of the *New Republic*, if a person had "an 'insatiable desire' to marry more than one wife, . . . what argument did gay activists have to deny him a legal, polygamous marriage?"<sup>18</sup> "Before long," Sullivan later reflected, he and the other opponents of DOMA testifying with him "were busy debating on what terms Utah should have been allowed into the Union and whether bisexuals could have legal harems."<sup>19</sup> In talks and op-ed pieces at about this time, conservatives William Bennett,<sup>20</sup> Robert Bork,<sup>21</sup> and

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16. *Defense of Marriage Act: Hearing on H.R. 3396 Before the Subcomm. on the Constitution of the House Comm. on the Judiciary*, 104th Cong. 88 (1996).

17. See *id.* at 145-46. Actually, two different sorts of plural marriages were mixed together: Under polygamy as commonly practiced, a man marries more than one woman. The women, however, are not considered married to each other. In the hearings and debates, polygamy was often lumped together with the notion of three men or three women marrying, a form of union that differs not only in being single-sex but also, at least by implication, in contemplating that all three of the men (or women) are married to each other.

18. Andrew Sullivan, *Three's a Crowd*, NEW REPUBLIC, June 17, 1996, at 10, 10.

19. *Id.*

20. William Bennett, in an opinion piece in *Newsweek*, asked:

On what *principled* ground can Andrew Sullivan exclude others who most desperately want what he wants, legal recognition and social acceptance? Why on earth would Sullivan exclude from marriage a bisexual who wants to marry two other people? . . . The same holds true of a father and daughter who want to marry. Or two sisters.

William Safire,<sup>22</sup> each with a tone of derision, linked same-sex marriage to polygamy. Bork even predicted that recognizing same-sex marriages would probably lead to a more receptive political atmosphere for polygamy and to legalized sex between adults and children.<sup>23</sup>

Representative Stephen Largent of Oklahoma pushed the analogy to polygamy and other disfavored unions a few steps further. Believing that "the crosshairs of the homosexual agenda" were directed at the institution of marriage,<sup>24</sup> Largent accused the gay activists of seeking to destroy the American family. If same-sex marriage is recognized, he asked rhetorically in the debate on the floor of the house,

What logical reason is there to keep us from stopping expansion of that definition to include three people or an adult and a child, or any other odd combination . . . ? There really is no logical reason why we could not also include polygamy or any other definition to say, as long as these are consenting human beings, and it does not even have to be limited to human beings, by the way. I mean it could be anything.<sup>25</sup>

Representative Largent, that is, claimed that if the government permitted a woman to marry another woman, logic would require that it permit a woman to marry her dog or her parakeet or, I assume, a flock of parakeets.

Most of the derisive allusions to polygamy and other prohibited unions should, of course, be seen as mere rhetorical flourishes. It seems unlikely that Largent seriously believed that recognizing same-sex marriage would lead to recognizing marriages of humans with dogs.

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Or men who want (consensual) polygamous arrangements.

William Bennett, *Leave Marriage Alone*, NEWSWEEK, June 3, 1996, at 27, 27.

21. In a CNBC cable interview, Bork said of same-sex marriage that "it will represent a relaxation of all sexual taboos and mores . . . I think we'll become more accommodating to man-boy associations, polygamists and so forth." Jennifer Harper, *Bork Envisions Gay 'Marriages' Winning in Courts*, WASH. TIMES, Sept. 21, 1996, at A5.

22. In an effort to make fun of the idea of same-sex marriage, Safire wrote a satirical defense of polyandry, the practice of women taking more than one husband. See William Safire, *A Case for Polyandry*, N.Y. TIMES, Mar. 18, 1996, at A15.

23. See *supra* note 21.

24. *Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 1996 WL 387295 (July 11, 1996).

25. 142 CONG. REC. H7443 (daily ed. July 11, 1996). In his testimony before a Senate Committee, Gary Bauer, President of the Family Research Council, similarly claimed that if same-sex marriage were permitted, not only would it be logically indefensible to prohibit polygamy, but it would also be logically inappropriate to continue "the limitation of the [marital] relationship to human beings." *Defense of Marriage Act: Hearing on S. 1740 Before the Senate Comm. on the Judiciary*, 104th Cong. 22 (1996).

Thus, responding to Largent and others on the floor of the House, Representative Barney Frank, one of the principal opponents of the bill, treated the allusions to polygamy as simple diversionary tactics: "When people get off the subject, allowing Hawaii to have gay marriages without penalizing them federally, and on to something wholly unrelated, polygamy, and attack the unrelated one, it is because they cannot think of any arguments to attack the first one."<sup>26</sup>

Representative Frank was partly right in his dismissive tone. He is right in the sense that Largent and other commentators found that glib allusions to polygamy and other feared forms of unions could add emotive force to their case against same-sex marriage. The conservatives found no need to attempt any serious inquiry into whether or not same-sex marriage was actually similar to these others.

The way in which Frank was wrong (though he may have been simply pretending to be thick-headed) was in doubting the sincerity of the feelings behind the proponents' analogy. Frank treats the analogies as disingenuous: "[F]or those who pretend not to know the difference between a monogamous relationship between two human beings and polygamy, I must say that I think they debase [the] debate when they use that kind of analogy. Everyone knows the real difference."<sup>27</sup> Whatever the "real difference" is, it appears to me that the conservatives genuinely viewed same-sex marriage as similar to polygamy and other nonconforming unions in two significant ways. First, they see them all as preposterous, as something barely imaginable in the world in which they live. Marriage just *is* the union of one man and one woman. And, second, they see these forms of union as moral equivalents, each repellant, each the appropriate province of the law to discourage or prohibit.

Representative Henry Hyde of Illinois, a supporter of the bill, expressed the point about moral equivalence with impressive succinctness at another point in the debate:

[M]ost people do not approve of homosexual conduct. They do not approve of incest. They do not approve of polygamy, and they express their disapprobation through the law. It is that simple. It is not mean

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26. 142 CONG. REC. H7483 (daily ed. July 12, 1996).

27. *Id.* at H7500. Earlier, Frank commented similarly: "If members are really telling me they do not understand the difference between a polygamous heterosexual relationship and a monogamous homosexual relationship, then they are confessing a degree of confusion that I guess I would be embarrassed to confess." *Id.* at H7484.



spirited. It is not bigoted. It is the way it is, the only way possible to express this disapprobation.<sup>28</sup>

By the end of the hearings and floor debates, many speakers had linked polygamy and same-sex marriage in generally unreflective comments. Neither side favored polygamy, and neither had any incentive to examine with greater care the actual history or practice of polygamy. Hyde and his friends who opposed same-sex marriage could comfortably continue to see themselves as free of bigotry; for, in his construction, if a view is held by "most people," it cannot be bigoted. To them, it is just that simple. And nothing Frank said altered Hyde's smug complacency.

Still, there is at least one instructive, if painful, lesson to carry away from the uses made of these other forms of union. For those of us who favor same-sex marriage, the hearings offer an opportunity to reflect upon forms of coupling of which we ourselves disapprove—polygamy perhaps, or the marriage of a father and daughter, whatever we ourselves find distasteful—and to realize that when many conservatives contemplate same-sex marriage, they have the same instinctive revulsion that we feel when we contemplate polygamy or incest. They do not see themselves as bigoted when they reject same-sex marriage any more than I see myself as bigoted when I reject the marriage of a mother and son. In *Romer v. Evans*,<sup>29</sup> the case dealing with the amendment to the Colorado Constitution prohibiting legal protections based on sexual orientation, gay advocates succeeded in persuading the United States Supreme Court that the anti-gay attitude of "most people" in Colorado was mere bigotry.<sup>30</sup> But gay peoples' larger strategy surely must be to search for the ways that help "most people" accept gay people as members of the human family, and their relationships as worthy of respect. What the floor debate on DOMA reminds us is that at the moment, many Americans, perhaps "most," still regard gay relationships as morally equivalent to incest or polygamy.

### III. GOVERNMENT AND POLYGAMY IN THE UNITED STATES: A CLOSER LOOK

The analogies drawn between same-sex marriage and polygamy in the Congressional debates were facile and offhand. In some ways they seem the emptiest propositions of geometry: If a woman can be

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28. *Id.* at H7501.

29. 116 S. Ct. 1620 (1996).

30. *See id.* at 1628-29.

connected to another woman, then a woman can be connected to two other women, or to two other men, or to a man, a woman, and a dog. The history of polygamy offers much more. In particular, the response of governments to Mormon polygamy in the late nineteenth century—and its sequels in the twentieth—offer interesting parallels with the current struggles. It also offers a few lessons.

Most Americans do not know that polygamy, and particularly polygyny, the practice of men marrying more than one woman, remains widespread in the world as a whole. Well more than half of nonindustrialized societies permit polygyny still today.<sup>31</sup> Few religious and utopian groups have practiced polygamy in Europe or the United States during the last several centuries,<sup>32</sup> although a few still do.<sup>33</sup> In the history of this country, by far the most significant and widespread practice of polygamy occurred among the Mormons during the later half of the nineteenth century, and it is the governmental response to Mormons in the nineteenth and twentieth centuries on which I focus.

### A. *The Late Nineteenth Century*

The Mormon Church—the Church of Jesus Christ of Latter-Day Saints—was founded about 170 years ago in upstate New York by Joseph Smith and a small group of others.<sup>34</sup> The Church's followers grew in numbers as the group moved west to Ohio, Missouri, Illinois, and eventually to Utah.<sup>35</sup> Led by patriarchal figures who were viewed as being in direct communion with God and Jesus Christ, the Church did

31. See 1 JESSIE L. EMBRY, *MORMON POLYGAMOUS FAMILIES: LIFE IN THE PRINCIPLE* 3 (1987); see also RICHARD A. POSNER, *SEX AND REASON* 69 (1992) ("Polygamy, in the form of polygyny, or plural wives . . . , is so common in non-Western societies that it can fairly be regarded as the norm.").

32. John Cairncross could find only two substantial occasions when polygamy was practiced by Christian Westerners: the Münsterites in Münster, Germany, in the 1530s, and the Mormons in the United States. See *AFTER POLYGAMY WAS MADE A SIN: THE SOCIAL HISTORY OF CHRISTIAN POLYGAMY* 215 (1974).

33. In the United States today, apart from the fundamentalist Mormon groups I will discuss in the text, the only other group I can find that currently practices polygamy is a Yoruban culture called Oyotunji, living near Sheldon, South Carolina. Only the Yoruban king within this group has more than one wife. The Yorubans in Oyotunji are African-Americans who follow the practices of the Yoruban peoples of Nigeria. See D. Aileen Dodd, *Woman Finds Self in African Culture*, TAMPA TRIB., Feb. 1, 1997, at 4 (describing the experiences of a woman who became the king's fourth wife in 1994).

34. Many accounts of the history of the Mormon Church exist. One fine overview is presented in KLAUS J. HANSEN, *MORMONISM AND THE AMERICAN EXPERIENCE* (1981).

35. See Martin E. Marty, *Foreword* to HANSEN, *supra* note 34, at xiii.

not initially espouse polygamy, though Joseph Smith himself took many wives.<sup>36</sup> It was not until 1852 that Church leaders formally declared polygamy to be ordained by God.<sup>37</sup> For Mormon men, as Church theology was expounded, polygamy and an abundance of children helped ensure an exalted place in the afterlife.<sup>38</sup> Mormon women's place in the afterlife was tied to the position of their husbands.<sup>39</sup> Men were encouraged, but not required, to take more than one wife, and in fact, at any given time only a small proportion of Mormon marriages were polygamous,<sup>40</sup> and most men who had more than one wife had only two wives.<sup>41</sup>

For the Mormons, the practice of polygamy fit within a tightly constricted moral code of sexuality. For both married men and women, sexual relationships outside of the marriage were regarded as deeply sinful.<sup>42</sup> Since the sole legitimate purpose of intercourse was for procreation, also regarded as sinful was intercourse within marriage during pregnancy or during a wife's lactation.<sup>43</sup>

From their earliest years, well before they embraced polygamy, Mormons encountered resistance and violence from non-Mormons who lived nearby. Their beliefs, in direct revelation and the sacred origin of the Book of Mormon, threatened mainstream Protestant hegemony.<sup>44</sup> In an age of relative pluralism, Mormons rejected tolerance for the beliefs of others<sup>45</sup> and refused to follow the commercial customs of the communities in which they lived, preferring to trade exclusively with other Mormons.<sup>46</sup> They also sought to exert political control wherever they lived.<sup>47</sup> Indeed, upon arrival in Utah, they quickly became the

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36. See RICHARD S. VAN WAGONER, *MORMON POLYGAMY: A HISTORY* 47-62 (1986).

37. See GUSTIVE O. LARSON, *THE "AMERICANIZATION" OF UTAH FOR STATEHOOD* 37-38 (1971).

38. See HANSEN, *supra* note 34, at 165; LARSON, *supra* note 37, at 38.

39. See KIMBALL YOUNG, *ISN'T ONE WIFE ENOUGH?* 33 (1954).

40. See LARSON, *supra* note 37, at 37-38.

41. See EMBRY, *supra* note 31, at 34.

42. See LAWRENCE FOSTER, *RELIGION AND SEXUALITY: THE SHAKERS, THE MORMONS, AND THE ONEIDA COMMUNITY* 146 (Illini Books 1984) (1981); see also LARSON, *supra* note 37, at 38 (stating that "adultery was counted next to murder as a deadly sin").

43. See HANSEN, *supra* note 34, at 167.

44. See *id.* at 29 ("It was its divine origin that gave it, in the minds of Mormons, a status and an authority at least equal, even superior to that of the Bible. And it was this claim, more than any other, that so enraged contemporary Americans."); see also *id.* at 51-83, 162 (discussing how the Mormons considered the practice of Mormonism the only true way to achieve an exalted afterlife).

45. See *id.* at 162-63.

46. See *id.* at 125-29.

47. See *id.* at 131-42.

dominant political force in the territory. Brigham Young, their leader, was soon installed as the territorial governor.<sup>48</sup> They were thus viewed with fear and hostility by most non-Mormons in the territory, a fact that would probably alone have triggered a violent political response to them even if they had not practiced polygamy.<sup>49</sup> But it was their practice of polygamy that became the principal articulated grounds of the political efforts to cripple them, and, in truth, it was polygamy, more than any other single practice or belief, that placed them outside the mainstream of American culture.<sup>50</sup>

The Mormons used their political power to support the practice of plural marriage. They controlled the Utah Territorial Legislature, and while the legislature never declared plural marriages legally permissible, it enacted laws to accommodate the lives of plural-marriage families. For example, in 1852, the legislature adopted a law providing that if a man died without a will, his illegitimate children and their mothers would inherit to the same extent as legitimate children.<sup>51</sup>

Congress responded over a nearly thirty-year period by passing increasingly severe laws aimed at curtailing polygamy and illegal cohabitation, with the ultimate aim of crippling the Mormon Church.<sup>52</sup> It began in 1862 by banning polygamy in the territories.<sup>53</sup> Several years later, it enacted additional legislation declaring that in order to be eligible to vote in the territories, men had to take an oath that they were not cohabiting with more than one woman.<sup>54</sup> It also barred polygynists from

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48. See LARSON, *supra* note 37, at 7.

49. For evidence that the political and economic power of the Mormons was at least an equal motive or the primary motive for the attack on them, see *id.* at 59, 207, 209, 243, 271, 281. One commentator later in the nineteenth century said that the polygamy issue was a “good war cry,” but the real issue was the Mormon’s “political and commercial solidarity.” *Id.* at 243 (quoting 3 ORSON F. WHITNEY, HISTORY OF UTAH 547 (Salt Lake City, Utah, George Q. Cannon & Sons Co. 1898)).

50. See HANSEN, *supra* note 34, at 157.

51. See Act of Mar. 3, 1852, ch. 14, § 25, 1852 Utah Laws 45. In addition, also in 1852, the territorial legislature, with the “intent to protect plural marriages”, passed an ordinance . . . that allowed [a] registry of marriages to be kept by the Church rather than by civil [authorities].” EMBRY, *supra* note 31, at 176.

52. Since Mormon men did not seek marriage licenses for their plural marriages, they could not be charged with having more than one “wife” at the same time. Thus, they were not usually charged with the crime of bigamy but with the crime of unlawful cohabitation. See VAN WAGONER, *supra* note 36, at 117.

53. See Morill Anti-Bigamy Act, ch. 126, 12 Stat. 501 (1862).

54. See Edmunds-Tucker Act, ch. 397, § 24, 24 Stat. 635, 639-40 (1887) (repealed 1978).

jury service and political office.<sup>55</sup> Finally, in 1887, in an astonishing gesture, Congress invalidated the corporation of the Mormon Church itself,<sup>56</sup> authorizing the escheat to the United States of all Church property not used exclusively for religious purposes.<sup>57</sup> In the same Act, unhappy that Mormon women continued to vote for Mormon candidates, it took away from women the right to vote.<sup>58</sup>

The dominant terms with which polygamy was condemned will sound familiar today to those following the debates over same-sex marriage.<sup>59</sup> The opponents believed that traditional monogamy was necessary to the survival of decent civilization. They associated polygamy not with love, but with uncontrolled and unnatural lust. Representative Shelby Collum, in introducing an antipolygamy bill in the 1870s, said:

Polygamy . . . is regarded by the civilized world as opposed to law and order, decency and Christianity, and the prosperity of the state. Polygamy has gone hand [in] hand with murder, idolatry, and every secret abomination. . . . Instead of being a holy principle, receiving the sanction of Heaven, it is an institution founded in lustful and unbridled passions of men, devised by Satan himself to destroy purity and authorize whoredom.<sup>60</sup>

Nearly all of the Acts of Congress directed at the Mormons were upheld as constitutional by the United States Supreme Court, with the Justices often using language that echoed Representative Collum's tone. In 1878, for example, Chief Justice Waite, in the celebrated case of *Reynolds v. United States*,<sup>61</sup> affirmed the conviction of a Mormon for bigamy, rejecting a claim that the prosecution of Mormons impinged on their free exercise of religion.<sup>62</sup> Polygamy, Chief Justice Waite wrote, "has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost

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55. See *id.*, 24 Stat. at 640; Edmunds Act, ch. 47, §§ 5, 8, 22 Stat. 30, 31-32 (1882) (repealed 1983).

56. See Edmunds-Tucker Act § 17, 24 Stat. at 638.

57. See *id.* § 13, 24 Stat. at 637.

58. Utah had been the only territory that had granted women suffrage. See *id.* § 20, 24 Stat. at 639.

59. See *supra* Part II.

60. PHILIP L. KILBRIDE, PLURAL MARRIAGE FOR OUR TIMES: A REINVENTED OPTION? 70 (1994) (quoting 8 GREAT DEBATES IN AMERICAN HISTORY 443 (Marion Mills Miller ed., 1913)).

61. 98 U.S. 145 (1878).

62. See *id.* at 165-66.

exclusively a feature of the life of Asiatic and of African people.”<sup>63</sup> He believed that only where monogamy is the rule does one find a government of the people. Polygamy, he concluded, leads to “stationary despotism.”<sup>64</sup>

By the end of the 1880s, over a thousand Mormon men with plural wives had been imprisoned; many others were in hiding as the result of pursuit by federal officers; tens of thousands of Mormons had been stripped from the voting rolls; and many of the Church’s assets had been successfully seized by the federal government.<sup>65</sup> In 1890, the President of the Church relented. He issued a Manifesto declaring that because the laws forbidding polygamy and the laws penalizing those who practiced it had been upheld as constitutional, the Church would submit to the laws of the land, and he would use his influence to discourage Mormons from plural marriage.<sup>66</sup> Thereafter, the federal persecution of the Church declined.<sup>67</sup> In 1896, a half-century after statehood was first sought, Congress finally admitted Utah into the Union.<sup>68</sup> Utah, in becoming a state, included in its constitution a provision forever banning plural marriage.<sup>69</sup>

Throughout these years of relentless attack, those who criticized plural marriage often claimed that they were motivated by a desire to protect the women and children forced into this unnatural way of life.<sup>70</sup> Some feminists of the era believed that so long as polygamy was practiced, there could be no equality for women.<sup>71</sup> And while it is true that the women in plural marriages were treated as subservient to their

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63. *Id.* at 164.

64. *Id.* at 166.

65. See LARSON, *supra* note 37, at 99-100, 181-83, 213-16.

66. See *id.* at 243-64; VAN WAGONER, *supra* note 36, at 135-43. A second manifesto was issued in 1904, making clear that plural marriages were prohibited and that those who entered into plural marriages were subject to excommunication. See *id.* at 173-74.

67. See LARSON, *supra* note 37, at 274.

68. See *id.* at 301.

69. Article Three of the Utah Constitution provides: “Perfect toleration of religious sentiment is guaranteed. No inhabitant of this State shall ever be molested in person or property on account of his or her mode of religious worship; but polygamous or plural marriages are forever prohibited.” UTAH CONST. art. III, § 1.

70. See LARSON, *supra* note 37, at 55-56; Robert G. Dyer, *The Evolution of Social and Judicial Attitudes Towards Polygamy*, UTAH B.J., Spring 1977, at 35, 37-38; Carol Weisbrod & Pamela Sheingorn, *Reynolds v. United States: Nineteenth-Century Forms of Marriage and the Status of Women*, 10 CONN. L. REV. 828, 829 (1978).

71. See Weisbrod & Sheingorn, *supra* note 70, at 840-41 (reporting that feminist groups of the time were split over polygamy, some believing it a serious evil standing in the way of women’s equality, and others believing that the true impediment to women’s progress was marriage itself).

husbands, bound to follow the master's directives, expected to devote their lives to begetting and raising children, and largely excluded from participation in public life, it is also true that most of the other women of the same era who were their husband's only wives were not generally in more liberated positions.<sup>72</sup> As one commentator put it at the time, "We are mistaken in supposing the women of Utah are in any greater bondage than are the women of the United States."<sup>73</sup> Polygamy simply evoked a more vivid image of the domineering, patriarchal male.

To be sure, some women in polygamous marriages suffered badly.<sup>74</sup> While many first wives enthusiastically consented to their husband's plural marriages, others felt coerced into agreeing or never knew until after the second marriage took place.<sup>75</sup> There were jealousies and tensions.<sup>76</sup> Divorces were granted by the Church, and the rate at which wives left polygamous marriages was apparently higher than the rate of civil divorces in this era.<sup>77</sup> A few who left their husbands spoke out publicly about the abuses.<sup>78</sup> In response to them and to the calls of others, Congress, when it passed the laws stripping the Church of its assets, provided funds for a home for women in polygamous marriages who wanted to escape.<sup>79</sup> But very few women ever sought refuge.<sup>80</sup> To the surprise of Easterners, at many points in the political attack on the Church, large numbers of Mormon women joined together to speak publicly in support of plural marriage and to affirm that polygamous husbands were living up to the highest callings of their religions.<sup>81</sup>

One explanation for Mormon women's public support of polygamy might, of course, be that the women were compelled to speak out by their husbands. And some may have been. Still, there is no reason to doubt the sincerity of these women's beliefs in the sacred meaning of plural marriage. Moreover, on the whole, these women and their children seem to have lived lives that were as satisfying as the lives of most of their contemporaries. The most exhaustive study of the living conditions

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72. See EMBRY, *supra* note 31, at 94-98.

73. T.W. CURTIS, THE MORMON PROBLEM: THE NATION'S DILEMMA 35 (1885), *quoted in* Weisbrod & Sheingorn, *supra* note 70, at 834.

74. See VAN WAGONER, *supra* note 36, at 93-96.

75. See EMBRY, *supra* note 31, at 53-60.

76. See LARSON, *supra* note 37, at 48-50; VAN WAGONER, *supra* note 36, at 49-50, 94.

77. See EMBRY, *supra* note 31, at 176-77.

78. See LARSON, *supra* note 37, at 56, 87.

79. See *id.* at 223-26.

80. See *id.* at 226-27.

81. See *id.* at 67-69, 133, 225-26.

of Mormon plural-marriage families in the late nineteenth century, Jessie Embry's *Mormon Polygamous Families*,<sup>82</sup> concluded that, in general, plural wives established harmonious relationships with each other<sup>83</sup> and tolerable relations with their husbands.<sup>84</sup> Many children, perhaps most, had relationships with their fathers typical of other children of their era.<sup>85</sup> Commonly, the children formed close relationships with both their mothers<sup>86</sup> and their fathers' other wives.<sup>87</sup> Women in plural marriages were motivated by the sacred function of plural marriage to strive to make the complex and awkward familial relationships succeed.<sup>88</sup> They often shared tasks and provided each other comfort.<sup>89</sup> And, though many of the women bore large numbers of children, research suggests that the number of children born to women in polygamous marriages was smaller, on average, than the number of children born to comparable women in single-wife families.<sup>90</sup>

### B. *The Early and Mid-Twentieth Century*

A substantial number of individual Mormons continued to practice plural marriage even after polygamy was officially denounced within the Church.<sup>91</sup> Indeed, in the first decades after the Manifesto disavowed polygamy, the Mormon Church leaders often secretly lent support to plural-marriage families.<sup>92</sup> But by the 1920s, the Church was led by men who genuinely rejected plural marriage and who excommunicated those who continued the practice.<sup>93</sup> This hardened attitude led to the splitting off from the Church of small groups of committed polygamist families who believed that the Church leaders had strayed from the true

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82. *Supra* note 31. For another cautious study reaching similar conclusions regarding the position of women, see FOSTER *supra* note 42, at 211-16.

83. *See* EMBRY, *supra* note 31, at 137-40.

84. *See id.* at 134-36.

85. *See id.* at 157. Some children whose fathers had many wives rarely saw their fathers at all. *See id.* at 159-61.

86. *See id.* at 152-57.

87. *See id.* at 161-66.

88. *See* FOSTER, *supra* note 42, at 207-09.

89. *See id.* at 48.

90. *See* EMBRY, *supra* note 31, at 35.

91. There were 2451 "plural" families in Utah, for example, in 1890, 1543 in 1899, and 897 in 1903. *See* LARSON, *supra* note 37, at 275.

92. *See* VAN WAGONER, *supra* note 36, at 154, 161-63.

93. *See* MARTHA SONNTAG BRADLEY, *KIDNAPPED FROM THAT LAND: THE GOVERNMENT RAIDS ON THE SHORT CREEK POLYGAMISTS* 21 (1993).



path.<sup>94</sup> During the 1930s and 1940s, these groups settled in rural communities in Southern Utah and Arizona.<sup>95</sup>

Political attention to the issue of polygamy declined sharply over the first half of this century. Yet, on the rare occasions when the issue surfaced, strong disapproval continued to be registered. Two court decisions rendered well into this century involving polygamous families illustrate the enduring hostility. Both centered around families who were members of one of the fundamentalist groups that had separated from the main Church.<sup>96</sup>

The first case, *Cleveland v. United States*,<sup>97</sup> was decided by the United States Supreme Court in 1946. The Court was reviewing a conviction under the Mann Act,<sup>98</sup> which criminalized transporting in interstate commerce "any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose."<sup>99</sup> The Mann Act had been adopted to control interstate prostitution rings.<sup>100</sup> Mr. Cleveland was not a pimp, however. He and his codefendants were fundamentalist Mormon men, deeply conservative in their religious and political beliefs, who practiced polygamy and who had simply traveled with their wives from one state to another.<sup>101</sup> The Court sustained the conviction in an opinion by Justice Douglas,<sup>102</sup> one of the most committed civil libertarians ever to sit on the Court.

Justice Douglas referred with approval to the decision in the case a half-century earlier upholding the escheatment of the Mormon Church's property. "The organization of a community for the spread and practice of polygamy," he quoted, "is, in a measure, a return to barbarism. It is contrary to the spirit of Christianity and of the civilization which Christianity has produced in the Western world."<sup>103</sup> In sustaining the

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94. See *id.* at 49-50.

95. See *id.* at 50.

96. See Ken Driggs, *Twentieth-Century Polygamy and Fundamentalist Mormons in Southern Utah*, DIALOGUE: A JOURNAL OF MORMON THOUGHT, Winter 1991, at 44. Driggs points out that the fundamentalists consider themselves part of the Mormon Church, who have set themselves apart in order to preserve certain sacred practices. See *id.* at 53.

97. 329 U.S. 14 (1946).

98. White-Slave Traffic (Mann) Act, ch. 395, 36 Stat. 825 (1910) (codified as amended at 18 U.S.C. §§ 2421-2424 (1994)).

99. *Id.* § 2.

100. See *Caminetti v. United States*, 242 U.S. 470, 489-90 (1917).

101. See *Cleveland*, 329 U.S. at 16.

102. See *id.* at 20.

103. *Id.* at 19 (quoting *Late Corp. of the Church of Jesus Christ of Latter-Day Saints v. United States*, 136 U.S. 1, 49 (1890)).

finding that the purpose of the polygamists' interstate travel was indeed "for debauchery" or was "otherwise immoral," he said that "[t]he establishment or maintenance of polygamous households is a notorious example of promiscuity" and that polygamy is "in the same genus as the other immoral practices [such as interstate prostitution] covered by the Act."<sup>104</sup> That is an astonishing statement. By referring to polygamous households as "a notorious example of promiscuity," Justice Douglas may have meant that a man who has two or more wives is, simply by definition, "promiscuous," a rather odd use of language. If he is suggesting more—polygamous households as dens of free sex—it reveals a willful ignorance of the families who were before his court. It may also reveal that when straight men imagine another man living down the street with three women, they often conjure lurid fantasies they feel the need to repress.

The second case was decided a decade later by the Utah Supreme Court.<sup>105</sup> It involved the children of Vera and Leonard Black, a polygamous Mormon couple living in Short Creek on the border of Utah and Arizona. The Governor of Arizona had arranged a massive raid on the town to rescue the women and children of the fundamentalist Mormon families living there. The Blacks lived in the Utah section of Short Creek with their eight children. Vera was the second of Leonard's three wives. After the raid, the public authorities in Utah filed a neglect petition against the Blacks. At trial, the state tried, but failed, to convince the juvenile judge that the Blacks' children were inadequately clothed and fed. The judge did, however, find the children neglected and ordered their removal from their parents on the grounds that the parents persistently violated the law prohibiting polygamy and wilfully instilled a positive view of polygamy in their children.<sup>106</sup>

On appeal, in 1955, the Supreme Court of Utah upheld the removal. Justice Worthen, speaking for the Court, believed that the juvenile court had been "too lenient" because it had left open the possibility of returning the children to their parents if the parents reformed.<sup>107</sup> He would have preferred to sever parental rights so that the children could be brought up "as law-abiding citizens in righteous homes."<sup>108</sup>

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104. *Id.*

105. *See In re Black*, 283 P.2d 887 (Utah 1955). For a discussion of the Short Creek Raids, see generally BRADLEY, *supra* note 93.

106. *See Black*, 283 P.2d at 888-92.

107. *See id.* at 913.

108. *Id.*

Justice Worthen's opinion, like Justice Douglas's in the *Cleveland* case, is one of those in which the passion of the language cannot be adequately explained by the mundane facts before the court. The *Black* opinion runs for twenty-six, double-columned pages, during which Justice Worthen never tries to identify harms that might accrue to the children while they are growing up. Nor does he try to identify the harms to the children that would occur to them if they did in fact end up living in plural marriages (as some of Leonard's daughters by his first wife already were). The unspoken premise of the opinion is that the deep immorality and destructiveness of the parents' conduct and attitude are too obvious even to need explanation. Justice Worthen realized and acknowledged that many upstanding citizens of Utah then living were themselves the children and grandchildren of polygamists, and curtly responded, "So what?"<sup>109</sup> as if that information was of no relevance to the probable future well-being of the Blacks' children.

### C. *The Latter Part of the Twentieth Century*

The great raid on Short Creek, Arizona, in 1954 by hundreds of deputy sheriffs that led to the neglect proceeding against Vera and Leonard Black turned into a political disaster for the Governor of Arizona. He had announced at the beginning of the raid that he was rescuing the 263 children of Short Creek from the "foulest conspiracy" and from "bondage" and the mothers and children from "white slave[ry]."<sup>110</sup> But the press and the public, in large numbers, came to view the raid as an attack by an overreaching government on a group of generally law-abiding citizens.<sup>111</sup> None of the children were found to be neglected, most mothers were not the least bit grateful for having been rescued, and every one of the accused fathers was released by a trial judge the Governor himself had appointed.<sup>112</sup>

More than forty years have passed since the Short Creek raid. Polygamous families continue to live in fundamentalist communities.<sup>113</sup> Short Creek, under a new name of Colorado City, has continued to grow.<sup>114</sup> By various estimates, between eleven and thirty thousand

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109. *Id.* at 909.

110. BRADLEY, *supra* note 93, at 207-13.

111. *See id.* at 149.

112. *See id.*

113. *See* IRWIN ALTMAN & JOSEPH GINAT, POLYGAMOUS FAMILIES IN CONTEMPORARY SOCIETY 48-56 (1996).

114. *See* BRADLEY, *supra* note 93, at 182.

people now live in polygamous relationships in these communities in the United States.<sup>115</sup> The communities differ, a few centered around a religious patriarch, others without a single leader and much like other small conservative Western towns.<sup>116</sup> For our purposes, the biggest difference between the 1950s and today is that, still remembering the unpopular raid, police and prosecutors leave the polygamous families alone.<sup>117</sup>

Explaining his county's policy of nonintervention, one Utah prosecutor recently commented: "If we [were] going after illegal cohabitation we'd have to line them all up—the older people living together, young couples, even homosexual couples living together—all violate the bigamy/cohabitation law. People don't make complaints about polygamists or cohabitation, so we don't investigate, don't file charges."<sup>118</sup> Why it is that people no longer complain is easy to understand. Most Americans have changed their views about the role of the criminal law in the context of nonviolent sexual behavior.<sup>119</sup> An Arizona prosecutor recently explained that his office has not prosecuted any polygamists since the 1960s because these relationships "appear to be consensual relationships among adults."<sup>120</sup> One hundred twenty years earlier, Chief Justice Waite would have found this reason to ignore obviously immoral behavior incomprehensible.

Prosecutors in Utah and Arizona have similarly ceased their efforts to remove children from polygamous parents simply on the ground of their polygamy.<sup>121</sup> A case like that involving the Black family would almost certainly lead to a different result today than it did forty years ago. As an indication of the change, the Utah Supreme Court, over the last decade, has held that a divorced woman's decision to enter into a plural marriage was, standing alone, an insufficient reason for denying her custody of her child,<sup>122</sup> and that a polygamous couple was not ineligible to adopt children simply because of the asserted immorality or

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115. See ALTMAN & GINAT, *supra* note 113, at 50-51; R. Michael Otto, Comment, "Wait 'Til Your Mothers Get Home": Assessing the Rights of Polygamists as Custodial and Adoptive Parents, 1991 UTAH L. REV. 881, 882-83.

116. See ALTMAN & GINAT, *supra* note 113, at 61-66; BRADLEY, *supra* note 93, at 185-88.

117. See BRADLEY, *supra* note 93, at 182-83.

118. ALTMAN AND GINAT, *supra* note 113, at 58.

119. Regarding bigamy in particular, see Ralph Slovenko, *The De Facto Decriminalization of Bigamy*, 17 J. FAM. L. 297 (1978-1979).

120. Doug J. Swanson, *Polygamists Weigh Price of Isolation; Community on Arizona-Utah Border Needs Economic Growth, Fears Outsiders*, DALLAS MORNING NEWS, Apr. 14, 1996, at 1A.

121. See Otto, *supra* note 115, at 883, 900-01, 906.

122. See *Sanderson v. Tryon*, 739 P.2d 623, 625 (Utah 1987).

the illegality of their relationship.<sup>123</sup>

The changed posture of prosecutors has been accompanied by a change in the tone with which newspapers and other media speak about polygamous families.<sup>124</sup> The polygamous family is commonly treated today as a slightly exotic oddity, not as the object of contempt or fear. A few years ago, for example, the *New York Times* printed an article about fundamentalist Mormon polygamous families.<sup>125</sup> Featured in the article is one of the wives in a polygamous marriage, an attorney with an active practice, who depends upon help from her husband's other wives for the care of her children. "As I see it," she is quoted, "'if this life style didn't already exist, it would have to be invented to accommodate career women.'"<sup>126</sup> In an even more recent essay in the *North American Review*, Florence Williams, a New Yorker, affectionately weaves the story of her own messy but conventional family history together with the story of a devoted Mormon family composed of a husband and his two wives. The Mormon wives were sisters, and their two marriages had lasted, in total, for a hundred years.<sup>127</sup>

Local news coverage has also changed in Utah. Recent obituaries in a mainstream Salt Lake City newspaper treat polygamists much like other local citizens. One obituary reports, for example, the death of a man who left behind 7 wives, 56 children, and 340 grandchildren.<sup>128</sup> Slight awe perhaps, but not disgust, comes through the account. Another recent article in the same newspaper reports quadruplets born to the second wife in a polygamist family.<sup>129</sup> The main theme of the article is whether or not the father's health insurance will cover the hospital costs.

Do the conditions of life for the people who live in plural marriage

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123. See *In re Adoption of W.A.T.*, 808 P.2d 1083, 1086 (Utah 1991). For more on both cases and a discussion of polygamy in the context of custody and adoption proceedings, see Otto, *supra* note 115.

124. Twenty years ago, for example, an article in the *Utah Bar Journal* expressed the view that "the success with which many nations have long lived with polygamy is indicative that it is only an alternate family style, no better and no worse, perhaps, than monogamy." Dyer, *supra* note 70, at 45.

125. See Dirk Johnson, *Polygamists Emerge from Secrecy, Seeking Not Just Peace but Respect*, N.Y. TIMES, Apr. 9, 1991, at A22. For a more recent article treating the polygamous family in a positive manner, see Florence Williams, *A House, 10 Wives: Polygamy in Suburbia*, N.Y. TIMES, Dec. 11, 1997, at F1 (describing the architecture of a modern polygamous home).

126. *Id.*

127. See Florence Williams, *Polygamy in America*, N. AM. REV., Mar./Apr. 1995, at 4.

128. See ALTMAN & GINAT, *supra* note 113, at 59.

129. See Dawn House & JoAnn Jacobsen-Wells, *Quadruplets Born to Polygamist; Minus Insurance?*, SALT LAKE TRIB., Feb. 28, 1992, at C1.

families today justify the change in tone? In particular, is the position of women tolerable? A few extended anthropological and sociological studies of these fundamentalist Mormon communities have been published in recent years, the most thoroughly documented of which is by Irwin Altman and Joseph Ginat.<sup>130</sup> Altman and Ginat visited, over an extended period, two quite different Mormon communities. What they (and others)<sup>131</sup> report is far too complex to capture in full here, but in large part validates the current posture of unalarmed curiosity exhibited by the mainstream press.

Today, as in the nineteenth century, the husbands and wives in the polygamous families they studied continue to view plural marriage as a step toward immortality in heaven.<sup>132</sup> As before, the husband/father is accepted as the patriarchal voice of authority.<sup>133</sup> As before, the wife's primary role is the tending of the home and the raising of children.<sup>134</sup> But the picture of polygynous life that emerges from these accounts is not one of rigid hierarchy or emotionally abused wives. Rather, in large measure, what emerges are relationships that seem bewilderingly complex, but fully within the range of acceptable social interactions.

For the spouses in these families, polygamy serves not only deeply felt religious values, but also a multitude of worldly values.<sup>135</sup> Many women find sharing the responsibilities for childrearing and the companionship of the other women satisfying.<sup>136</sup> The women often encourage their husbands to marry additional wives.<sup>137</sup> The earlier wives frequently accompany the husband on dates, participating in the selection of a new partner.<sup>138</sup> When a new wife joins an existing household, it is, to be sure, often difficult for everyone—difficult for the earlier wives who have to adjust to a new (and typically younger) woman's presence, difficult for the new wife who often envies the easy relationship shared by the earlier wives and the husband, and difficult for the husband obliged by tradition to treat everyone equally.<sup>139</sup> Each wife

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130. See *supra* note 113.

131. Two other extended studies are KILBRIDE, *supra* note 60, and EMBRY, *supra* note 31. Kilbride is an advocate of polygamy as a social option, but he has undertaken a careful, seemingly balanced inquiry that is similar in tone to ALTMAN & GINAT, *supra* note 113.

132. See ALTMAN & GINAT, *supra* note 113, at 3.

133. See *id.* at 387-88.

134. See *id.* at 388.

135. See KILBRIDE, *supra* note 60, at 68-69.

136. See *id.* at 77-79.

137. See ALTMAN & GINAT, *supra* note 113, at 98-101; KILBRIDE, *supra* note 60, at 79.

138. See ALTMAN & GINAT, *supra* note 113, at 113.

139. See *id.* at 154-79.

not only has a relation with the husband, but a relationship with each other wife and the group of wives as a whole.<sup>140</sup> Relationships grow geometrically as new wives are added. Yet in large numbers, the families make it work and feel that they are living well and serving God.

Not all women are happy. Some flee the community because they feel oppressed;<sup>141</sup> some simply leave a polygamous union in dissatisfaction.<sup>142</sup> Splitting up is common, but it is difficult to determine whether the rate of separation is higher than the rate of divorce among monogamous Mormon couples.<sup>143</sup> In the end, for every disadvantage that seems to exist for polygamy from the point of view of the participants, there also seems to be some corresponding advantage.

#### IV. PARALLELS AND LESSONS

##### A. *Parallels*

In many respects, the gay people seeking marriage today and the fundamentalist Mormons living in polygamous marriages could hardly be less alike. Mormon doctrine considers homosexual conduct sinful.<sup>144</sup> Few gay men and lesbians whom I know have any desire to lead the Mormon way of life. Most Mormons vote Republican.<sup>145</sup> Most gay people vote Democratic.<sup>146</sup> Yet, for all the differences between them, many aspects of their political and social experience are obviously similar. If you are familiar with the history of the efforts to achieve same-sex marriage, you have probably already noticed many parallels.

As a starting point, Mormons and gay people in the United States each actively sought to protect and advance their interests in the political process wholly apart from matters relating to marriage.<sup>147</sup> At the time

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140. See KILBRIDE, *supra* note 60, at 77.

141. See Florence Williams, *Mojo's August Hellraiser!*, MOTHER JONES, July/Aug. 1994, at 19 (discussing anti-polygamy activist Jenny Larson).

142. See ALTMAN & GINAT, *supra* note 113, at 470.

143. See *id.* at 470-71.

144. See *Editors' Introduction to PECULIAR PEOPLE: MORMONS AND SAME-SEX ORIENTATION*, at xxiv-xxviii (Ron Schow et al. eds., 1991). Indeed, the Mormon Church sought to intervene as a party in the Hawaiian marriage case to argue that same-sex marriage should not be constitutionally protected. See *Baehr v. Miike*, 910 P.2d 112 (Haw. 1996).

145. See Michael Prowse, *Christian Crusade*, FIN. TIMES, Feb. 12, 1996, at 18.

146. See Kenneth T. Walsh et al., *Why Clinton Fights for Gays*, U.S. NEWS & WORLD REP., Feb. 8, 1993, at 33, 36.

147. See WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 8 (1996); LARSON, *supra* note 37, at 207, 209, 243, 271, 281.

that attacks on them began because of their stands on marriage, others already viewed them as serious social and political threats. I have described the hostility against the Mormons as they sought to build a state founded on their religious beliefs. By comparison, the gay community's political goals seem modest. Yet, Senator Helms expressed a view during the floor debate on DOMA that is shared by many conservative Americans: "[I]nch by inch, little by little, the homosexual lobby has chipped away at the moral stamina of some of America's courts and some legislators, in order to create the shaky ground that exists today that prompts this legislation."<sup>148</sup> And, in fact, the "homosexual lobby" with its much-maligned "homosexual agenda" made significant advances—nondiscrimination laws in many states,<sup>149</sup> health benefits for same-sex partners of employees at many universities, cities and corporations,<sup>150</sup> the election of many openly gay political candidates,<sup>151</sup> and so forth.

Each of these politically active groups then compounded the public resistance to them by directly challenging the conception of marriage held by the majority. In quite different but equally fundamental ways, the reconfiguration of marriage that each group sought pinched a central nerve of the existing social order: Heterosexual polygyny preserves sexual hierarchy but challenges sexual exclusivity and sexual restraint. Monogamous same-sex marriage honors exclusivity but challenges sexual hierarchy. In each case, politicians have claimed that the nonconforming marriage undermines the family and threatens civilization as a whole. The language of Senators Robert Byrd and Jesse Helms last year on the floor of the Senate is little different in its tone than that of Representative

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148. 142 CONG. REC. S10,068 (daily ed. Sept. 9, 1996). See also Justice Scalia's dissenting opinion in *Romer v. Evans*, 116 S. Ct. 1620, 1634 (1996) ("[T]hose who engage in homosexual conduct . . . possess political power much greater than their numbers, both locally and statewide.").

149. See, e.g., CONN. GEN. STAT. ANN. §§ 46a-81a to -81r (West 1995); D.C. CODE ANN. §§ 1-2519 to -2520 (1992 & Supp. 1997); HAW. REV. STAT. § 378-2 (1993 & Supp. 1996); ME. REV. STAT. ANN., tit. 5, § 4684-A (West Supp. 1996); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996 & Supp. 1997); MINN. STAT. ANN. § 363.03 (West 1991 & Supp. 1997); N.J. STAT. ANN. § 10:5-12 (West 1993 & Supp. 1997); R.I. GEN. LAWS §§ 11-24-2 to -2.2, §§ 28-5-2, -5, -7 (1994-1995 & Supp. 1996); VT. STAT. ANN. tit. 21, § 495 (1987 & Supp. 1996); WIS. STAT. ANN. § 111.36(d)(1) (West 1997).

150. See Robert H. Knight, *How Domestic Partnerships and "Gay Marriage" Threaten the Family*, in SAME-SEX MARRIAGE: THE MORAL AND LEGAL DEBATE 108, 109-10 (Robert M. Baird & Stuart E. Rosenbaum eds., 1997).

151. See Deb Price, *Election '96 Brings Many Gains for the Gay-Rights Movement, with Just a Few Losses*, DETROIT NEWS, Nov. 8, 1996, at E3.



Shelby Collum attacking the Mormons over a century before.<sup>152</sup>

And, of course, for their hubris in challenging the majority, Mormons and gay people paid a price, the Mormons much more painfully (so far) in the jailing of their men and the legislated pillaging of their property, but DOMA, in its own way, is as heavyhanded a piece of legislation for the 1990s as the anti-Mormon legislation of the prior century. DOMA is the only statute Congress ever enacted that would deny federal benefits otherwise available to married persons to a group of persons validly married under a state's law.

Further, both Mormons and gay people underestimated in advance the virulence of the political response their posture on marriage would engender. The Mormons, in settling in Utah and seeking statehood, did not foresee that Congress would act to crush them. Gay people, in filing lawsuits in Hawaii, did not foresee that Congress and half the states would respond with hostile legislation.<sup>153</sup> Each group may have failed to understand how much other mainstream Americans' sense of security was tied up in their definition of appropriate familial relationships.

At all points in their political history, the majority's response to the two groups has been affected by its conceptions of the lives of those within the groups. Many of those conceptions have been distorted, mirroring the fears of the opponents. You will recall that as recently as the 1940s, Justice Douglas depicted polygamous households as "a notorious example of promiscuity."<sup>154</sup> Today, it is gay people, and gay men in particular, who are perceived as the notorious examples of promiscuity, believed incapable of enduring relationships.<sup>155</sup> In each case, of course, the reality to the rejected group's lives has been much more prosaic. Most lesbians and gay men already live within couples,

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152. See 142 CONG. REC. S10,109 (daily ed. Sept. 10, 1996) ("The suggestion that relationships between members of the same gender should ever be accorded the status or the designation of marriage flies in the face of the thousands of years of experience about the societal stability that traditional marriage has afforded human civilization." (statement of Sen. Byrd)); 142 CONG. REC. S10,068 (daily ed. Sept. 9, 1996) (arguing that the same-sex marriage movement threatens "the moral and spiritual survival of this Nation" (statement of Sen. Helms)); see also text accompanying notes 64-65.

153. See John Cloud, *A Different Fathers' Day: New Jersey Gay Couples Can Now Adopt Jointly. But Will One State's Move Trigger a Backlash in Others?*, TIME, Dec. 29, 1997, at 106.

154. *Cleveland v. United States*, 329 U.S. 14, 19 (1946).

155. See ESKRIDGE, *supra* note 147, at 9-10. For a recent example of writing conveying this misconception, see Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 864-65; see also *id.* at 855.

many of them quite long-term.<sup>156</sup> Like the fundamentalist Mormons, these families carry on day-to-day lives that are in many regards surprisingly similar to those of heterosexual monogamous couples. For most, the “homosexual lifestyle” turns out to be nearly as dull as everyone else’s.

At the same time that the view of gay people as compulsively promiscuous persists among many Americans, other Americans are changing their perceptions in a manner similar to their apparently changing perceptions of fundamentalist Mormons. Americans are now being offered a more accurate and sympathetic view of the lives of gay people and Mormon polygamists through newspapers, magazines, and television. For both, the coverage now commonly emphasizes, not the differences, but the parallels between their lives and the lives of the majority—the mourning for a dead partner, the travails of health insurance, and the challenges of parenting. Each group is passing, that is, through a process of social normalization.

Put into a larger context, we live in a time when, to an increasing number of Americans, what matters in human relationships is less the observance of traditional structures than the quality of human interactions. Thus, many Americans can look at gay and polygamous families today and ask different questions than they would have asked fifty years ago. In both Short Creek and in many lesbian households today, little Heather has two Mommies,<sup>157</sup> and more and more Americans believe that if Heather is doing well, then having two mommies is just fine.

### B. Lessons

One might reflect upon the history and conclude that the Mormons triumphed through surrender. After disavowing plural marriage, they were accepted into “civilized” society and have thrived.<sup>158</sup> Must gay

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156. See David L. Chambers, *What If? The Legal Consequences of Marriage and the Legal Needs of Lesbian and Gay Male Couples*, 95 MICH. L. REV. 447, 449 (1996); Brent Hartinger, *A Case for Gay Marriage: In Support of Loving & Monogamous Relationships*, 118 COMMONWEAL 681, 681 (1991).

157. “Heather” is the main character in a children’s book depicting the life of a little girl with two lesbian parents. It has frequently been attacked by right-wing groups trying to purge books from the shelves that portray gay lifestyles in a positive light. See LESLÉA NEWMAN, *HEATHER HAS TWO MOMMIES* (1989).

158. See David Van Biema, *Kingdom Come*, TIME, Aug. 4, 1997, at 50 (cover story on the recent growth of the Mormon Church); see also Russell Shorto, *Belief by the Numbers*, N.Y. TIMES, Dec. 7, 1997, § 6 (Magazine), at 60 (reporting a 96 percent growth in membership in the Mormon Church over the last 30 years, as a proportion of the United States population).

people do the same? Must they surrender their hopes for marriage in order to find wider acceptance? Not all gay people embrace the idea of marriage,<sup>159</sup> but for those who do, DOMA and the state legislative responses to the Hawaii decisions demonstrate the extraordinary protectiveness of mainstream society for its current conception of marriage. The Mormon experience simply offers more evidence of the lengths to which the majority will go.

Despite both the Mormon experience and DOMA, the recent litigation regarding same-sex marriage has nonetheless had beneficial effects even if, for the next many years, no state actually changes its laws to permit gay people to marry. The Hawaii decisions have prompted a healthy public conversation about same-sex desire, about gay people, and about marriage within our society. This conversation may well produce support for other sorts of legal changes apart from marriage—support for domestic partner legislation, for employment nondiscrimination laws, and so forth. On the other hand, of course, DOMA and the new state laws have inflicted serious harms. They have caused pain to gay men and lesbians forced to listen to the hateful speeches of politicians who supported them. And now that these laws are embedded in statute books, they are likely to make the period before same-sex marriage is recognized even longer.

In the end, however, the principal lesson I would draw from the review of the Mormon experience is less instrumental. It is a lesson in humility and understanding. I began this inquiry into polygamy because I was intrigued by the strategic use of analogies by the supporters of DOMA. If same-sex marriage is permitted, they repeatedly asked, how could one deny others the right to enter into polygamous marriage. I'd like to end by addressing their question: Is there a principled difference between polygamy and same-sex marriage? I am less interested in finding a correct answer to this question than I am in reflecting on the reasons given by supporters of same-sex marriage when they have distinguished polygamy from same-sex marriage and on the ways that supporters of same-sex marriage ought to think about the question.

When asked by Congressmen about polygamy, the opponents of DOMA were, of course, in a bind. Even if they were sympathetic to polygamy, the Congressional hearings on DOMA were hardly an

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159. See, e.g., Paula L. Ettelbrick, *Wedlock Alert: A Comment on Lesbian and Gay Family Recognition*, 5 J.L. & POL'Y 107 (1996); Nancy D. Polikoff, *We Will Get What We Ask For: Why Legalizing Gay and Lesbian Marriage Will Not "Dismantle the Legal Structure of Gender in Every Marriage,"* 79 VA. L. REV. 1535, 1536-37 (1993).

auspicious occasion to say so. Making a persuasive case against legislation aimed at same-sex marriage posed enough of a challenge without taking on the defense of another suspect form of union. Nonetheless, at other times, before and after DOMA's enactment, the defenders of same-sex marriage have gone out of their way to explain why polygamy deserves to be looked upon less favorably than same-sex marriage, and it is these positions that I wish to end by examining.

In an editorial essay in the *New Republic*, written after his Congressional testimony on DOMA, Andrew Sullivan offers as the principal distinction between polygamy and same-sex marriage: "Almost everyone seems to accept, even if they find homosexuality morally troublesome, that it occupies a deeper level of human consciousness than a polygamous impulse."<sup>160</sup> Making much the same argument, another political observer distinguishes polygamy from same-sex marriage by claiming, "What homosexuals are asking for is the right to marry, not anybody they love, but *somebody* they love, which is not at all the same thing."<sup>161</sup>

Sullivan's reasoning is unsatisfying as a basis for distinguishing polygamous marriages. As an initial matter, it suggests that a group should have to offer particularly strong reasons if they are to receive the right to legal marriage, whereas the question might better be approached by assuming that persons should be permitted to marry whomever they choose, unless the state has good reasons for rejecting their choice. Secondly, and growing out of the history reviewed in this Article, supporters of gay marriage are simply wrong to claim that gay peoples' need for a union with another person of the same sex is more compelling than the needs of others who already have a spouse and who want to add a second or a third. History suggests that, for many Mormons, the desire to take an additional spouse grows out of deeply held beliefs central to their conceptions of themselves and their purposes in life. Those of us who favor same-sex marriage need to become more understanding of needs derived from sources other than the libido.

William Eskridge, another advocate of same-sex marriage, relies on other grounds for claiming that the case for same-sex marriage is superior to the case for polygamy.<sup>162</sup> Drawing on the writings of

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160. Sullivan, *supra* note 18, at 10.

161. Jonathan Rauch, *Marrying Somebody*, in ANDREW SULLIVAN, SAME-SEX MARRIAGE: PRO AND CON 285, 286 (1997).

162. See ESKRIDGE, *supra* note 147, at 148-49.

Richard Posner,<sup>163</sup> he argues that polygamy *can* lead to harms that society has a legitimate interest in preventing. If people could take more than one spouse, "the central goals of marriage, namely, its companionate and social insurance features, would be compromised."<sup>164</sup> He speculates that "the intensity of [the] emotional bond" between the husband and any of his plural wives would be diminished, and that serious rivalries and tensions would likely result.<sup>165</sup> Moreover, he claims that polygamy may promote an authoritarian, male-dominated hierarchy within the marital relationship, thereby undermining "the companionate goal of marriage [and] contribut[ing] to gender inequality."<sup>166</sup>

Maura Strassberg holds similar but even more intensely negative views about polygamy. In a recent defense of same-sex marriage and attack on polygamy,<sup>167</sup> she endorses the conclusion in *Reynolds v. United States*<sup>168</sup> that monogamy is essential to democracy<sup>169</sup> and that polygamy is inconsistent with it.<sup>170</sup> She finds polygamy disadvantageous to women as well as to men. She also finds polygamy essentially loveless<sup>171</sup> and claims that polygamous families are so lacking in loyalties among family members that torture and mutilation are often used as devices of control.<sup>172</sup>

Like Sullivan, Eskridge makes his point without examining the actual reported experiences of polygamous families in this country. Strassberg does look at some current materials but emphasizes only the

163. See POSNER, *supra* note 31, at 253-60. Eskridge credits Judge Posner for many of his points in distinguishing polygamy. See ESKRIDGE, *supra* note 147, at 149 n. 54.

164. ESKRIDGE, *supra* note 147, at 148-49.

165. *Id.* at 149.

166. *Id.* at 149.

167. See Maura I. Strassberg, *Distinctions of Form or Substance: Monogamy, Polygamy and Same-Sex Marriage*, 75 N.C. L. REV. 1501 (1997).

168. 98 U.S. 145 (1878).

169. "Monogamous marriage is uniquely capable of producing free-thinking and independent individuals who also are capable of choosing to be loyal and trusting citizens." Strassberg, *supra* note 167, at 1577; see also *id.* at 1523-24, 1536-37.

170. See *id.* at 1593.

171. See *id.* at 1534.

172. Strassberg wrote:

Indeed, modern studies of formal and informal polygamy across many historical and contemporary cultures have suggested that so little loyalty naturally develops among polygamous family members that strong external controls, such as walls, armed guards, or the threat of torture, mutilation, or death for sexual or political disloyalty to the patriarch, are frequently utilized to preserve family integrity.

*Id.* at 1533 (citing LAURA L. BETZIG, *DESPOTISM AND DIFFERENTIAL REPRODUCTION: A DARWINIAN VIEW OF HISTORY* 79-82 (1986), which provides an account of a recent "grisly blood feud" among contemporary Mormon fundamentalists who practiced polygamy).

most negative.<sup>173</sup> To my reading, the actual experiences of American men and women in plural marriages seems more complex and less sinister than Strassberg portrays them and than Eskridge imagines them. Many people in plural marriages find temporal and religious satisfactions that greatly outweigh their disadvantages. I wish that Eskridge and Strassberg, whose work I admire, had approached their inquiry into polygamy more open-mindedly and sympathetically. That is, after all, what advocates for gay marriages are asking heterosexual people to do with regard to same-sex relationships.

Can I myself distinguish the case for same-sex marriage from the case for polygamy? Is the case for same-sex marriage stronger? I am uncertain, and at a time when no group in the United States is seriously lobbying for plural marriage, I have no desire to become its champion. I have nonetheless been greatly moved by my readings of the experiences of the Mormons, today and in the past. The fundamentalist Mormon communities in Arizona and Utah seem likely to survive for the indefinite future; yet the families who live in plural marriages are caught in the same anomalous position that gay couples find themselves in most of the United States—no longer persecuted by the authorities, integrated into the social fabric of the cities in which they live, but not yet accepted as full legal participants. If a plural-marriage Mormon man dies today without a will, his second wife takes nothing under the law. Unless some strong reasons exist for continuing to exclude them, I would favor legal mechanisms to give recognition to more than the first marriage.

In a society with as heterogeneous a population as ours, the wisest role for the state in its relationship to families is one of supportive tolerance: The state should identify the patterns of family arrangements that actually exist and that endure throughout time. It should then perform a facilitative role to help these families prosper, unless strong reasons exist for believing that the arrangements cause significant harms.<sup>174</sup> Under this view, the state would regard its decision to permit a certain group to marry (or its decision to provide a benefit to some family configuration), not as an endorsement of the group's worthiness, but as a simple recognition of their ongoing, nondestructive presence in the community and as a recognition of the group's need for access to the

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173. She does not relate, for example, the positive findings of ALTMAN & GINAT, *supra* note 113.

174. See David L. Chambers, *The "Legalization" of the Family: Toward a Policy of Supportive Neutrality*, 18 U. MICH. J.L. REFORM 805 (1995).

benefits and responsibilities that attach to various legal constructs, including marriage.

Thus, if there were a move to legalize plural marriages, I would encourage the state to permit them unless they genuinely posed significant harms. My reading of the evidence regarding those who live within such relationships today suggests that plural marriage, as actually practiced by Mormon fundamentalists today, does not pose such risks to the men, women, or children living within these arrangements, but, of course, a more careful inquiry would be more appropriate than I have given it. In making such an inquiry, I would not count as an adequate harm that women in these marriages are regarded (and regard themselves) as subordinate to their husbands if the lives these women actually lead are tolerable in a pluralist society. We need to remember that large numbers of conservative Christians, Muslims, and Jews in monogamous marriages in the United States today accept a view of wives as subordinate to their husbands.

I recognize, of course, that the case for polygamy cannot rest on the experiences of the Mormons only. If polygamy were made legal, it might have a dramatically different impact on other Americans' lives than it has on the lives of fundamentalist Mormons. It is conceivable, I suppose, that if polygamous marriages were permitted (and especially if only men took plural spouses) that men with financial resources would begin marrying multiple wives and that poorer men would find themselves without women to marry. It is also conceivable that the presence of polygamous marriages around them would cause men in single-wife marriages to engage in more adulterous relationships, act in more authoritarian manners toward their wives, or cause women in general to feel less valued within the society. All of this is conceivable, but since plural marriage would almost certainly remain a rarity, even if permitted, these possibilities seem not much more plausible than the prospect conjured by Senator Jesse Helms that permitting gay marriage would lead to the collapse of American society.

A more realistic concern regarding polygamy is that the experiences of non-Mormon women who end up in plural marriages would be less fortunate than the experiences of fundamentalist Mormon women appear to be. A fundamentalist Mormon woman, on marriage, accepts (perhaps even looks forward to) the prospect that her husband will take one or more additional wives. She accepts the prospect because of its religious and social meaning in her life. Most American women would be appalled at the prospect of their husband courting and marrying additional women. For most Americans, marriage marks a point at which they expect

psychic repose, a point at which they receive a credible (even if not always reliable) promise of exclusivity in their relationship.<sup>175</sup> Providing that commitment and that sense of repose is a value worth preserving for those to whom it is important. The position of non-Mormon women in multiple marriages might also be worse if non-Mormon men who married second and third wives failed to accept the obligation, apparently instilled in Mormon men, to contribute to the support of all of their wives and children and to treat their wives equally.<sup>176</sup>

Thus, the fear that polygamy will cause harms to persons not supported by a cultural or religious context does seem to have a reasonable foundation. At the same time, the claims that could be made for the fundamentalist Mormon families are also substantial. While it might be possible to accommodate both sets of interests to some extent,<sup>177</sup> my point in this Article is not to make the case for or against legalized polygamy. It is rather to argue that we who advocate for changes in the laws of marriage to open it up to gay people need to work to become as understanding of the needs of others as we are asking others to be of us.

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175. In his discussion of polygamy on the floor of the House of Representatives, Representative Barney Frank said that polygamy is distinguishable from same-sex marriage because "polygamy as an option for heterosexuals would weaken the current option of monogamous heterosexual marriage." 142 CONG. REC. H7483 (daily ed. July 12, 1996). Representative Frank did not explain what he meant, but this may have been his point.

176. A polygamous Mormon man in Canada made this point well after Canadian authorities, on the ground of religious freedom, declined to enforce a ban on polygamy. Asked whether he favored the legalization of polygamy, the man said, "If plural marriage is legal, the nonrighteous could take numerous wives without heeding God's laws." *Canada Court: Polygamy Ban is Invalid*, SALT LAKE TRIB., June 16, 1992, at A4.

177. It may be possible to serve the needs of fundamentalist Mormons and of other men and women who genuinely want to participate in plural marriages, while protecting the interests of the spouse who wishes to remain in a single-spouse marriage. In South Africa today, for example, a citizen may choose to marry under South African civil law, which binds them in a monogamous relationship, or to join with another person in a "customary marriage" which leaves open the possibility of plural wives. See SOUTH AFRICAN LAW COMMISSION, DISCUSSION PAPER 74, PROJECT 90: THE HARMONISATION OF THE COMMON LAW AND THE INDIGENOUS LAW (CUSTOMARY MARRIAGES) 3 (1997). In South Africa, a "customary marriage," although recognized, has never received the full legal recognition accorded to civil marriage due to the long standing bias towards monogamous relationships. See *id.* at 2. In an effort to achieve an integrated society, the South African Law Commission is considering recommending that both forms of marriage be given full legal recognition, with spouses making a choice of which form of marriage they are entering at the point of marriage. See *id.* at iv, vi, 129-35.